

## INTERNATIONAL CITY MANAGERS' ASSOCIATION

1313 EAST 60TH STREET - CHICAGO 37, ILLINOIS

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## ADMINISTRATION OF ZONING VARIANCES

What are variances? What agency should grant variances? What principles should guide a zoning appeals board in granting variances, and what rules should a board adopt to conduct its business?

The proper handling of requests for variances from the zoning ordinance requires a certain type of organizational set up and knowledge on the part of the officials who administer this technical phase of zoning. To prevent a misuse of the variance privilege, city officials need a clear understanding of what the variance is and how it should be administered. This report defines what variances are, lists some of the guiding principles for determining whether a variance should be granted, indicates who should grant zoning variances, sets forth the functions of the zoning appeals board, and outlines the rules to govern the conduct of such a board. Some of the information in this report is based on an Association survey made late in 1947 of the experience of 20 cities in granting zoning variances. The 20 cities are: Albert Lea, Minn.; Ashtabula, Ohio; Austin, Tex.; Brookline, Mass.; Charlottesville, Va.; Cincinnati, Ohio; Eugene, Ore.; Flint, Mich.; Greensboro, N. C.; Hamilton, Ohio; Mamaroneck, N. Y.; Milwaukee, Wis.; Pasadena, Calif.; Pontiac, Mich.; Pottstown, Pa.; Rochester, N. Y.; Salina, Kan.; Teaneck, N. J.; University City, Mo.; and Wichita, Kan.

What Are Zoning Variances. A zoning ordinance affects every individual piece of property yet the ordinance has to be framed so that each regulation will apply to an entire district. Somewhere in the city there are likely to be individual pieces of property of such unusual shape, size, topography or location that the strict enforcement of the zoning ordinance would deprive the owners of the use of their property. The city may concede that the property owner should be allowed to use his property in ways that do not strictly conform to the zoning ordinance. In other words, the city makes an exception in his case. A variance is one form of exception, limited to those instances where the irregularity, shape, depth, steepness, shallowness, sometimes location and other exceptional physical conditions of the property would deprive the owner of a reasonable use of his land if the zoning ordinance were strictly applied. Value of the property, needs of the surrounding areas, aesthetics, and profitability of alternative uses to which the land can be put are not considerations in determining whether a variance should be granted.

To illustrate: a property owner may have a corner lot so shallow that if he met the requirements for front and rear yards he would not have sufficient land upon which to build a house. If no exceptions were allowed in this case, the property owner might well claim in the courts that the zoning ordinance had deprived him of the use of this property without due process of law and without compensation and was therefore unconstitutional. The courts would doubtless agree. Adverse court decisions of this nature would jeopardize the whole process of zoning and would be time consuming and costly both to the city and to the property owner.

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The zoning board of appeals may take care of these unusual cases by allowing minor departures from the strict letter of the regulations so as to afford relief to an individual property owner from unnecessary hardship but at the same time not harm the general public or the interest of the adjoining owners. In granting these exceptions the board may establish special conditions designed to make the exception less objectionable. For example, in the hypothetical case of the shallow lot the board of appeals might allow the property owner to provide a rear yard of only 20 feet deep instead of the required 25 feet, on condition that he build a garage attached to the house rather than a separate garage at the rear of the lot.

The Agency to Grant Variances. Variances from the zoning ordinance should be granted by a zoning appeals board or a board of adjustment only after a public hearing on the exception requested. It is doubtful whether the planning commission should be authorized to grant variances and much more doubtful as regards the city council. The planning agency loses its freedom to plan if given the responsibility for enforcing the zoning ordinance. The city council may indulge in "spot zoning" when acceding to requests concerning individual pieces of property. Preferably a board of appeals should be appointed by the mayor or the city council and should include representatives from the city planning agency and perhaps also a member of the city council.

This appears to be the practice in the 20 cities surveyed by the Association. The appeals board is appointed by the mayor in 7 cities, by the council in 6 cities, and by the city manager in 2. In the five remaining cities, the city council acts as the appeal board in Salina, the city planning commission in Ashtabula, Eugene, and Flint, while in Pasadena a committee of the planning commission serves as the appeals agency. In Albert Lea the appeals board merely recommends, and the council holds the hearing and takes final action.

In addition to the four cities where the plan commission itself is the appeals board, from one to three members of the plan commission are members of the board in eight cities making a total of 12 out of 20 cities where the planning commission members are on the appeals board. In only three cities, however, is a member of the council a member of the appeals board except in Salina where the entire council constitutes the appeal board. These three cities are Ashtabula, Flint, and Wichita.

What are the functions of the zoning appeals board and what should be its relation to the planning commission and the city council? The zoning appeals board has three responsibilities: (1) the interpretation of the zoning ordinance, (2) the issuance of special permits, and (3) the granting of variances. An explanation might be made of the first two responsibilities. In the case of interpretation of the zoning ordinance the board of appeals would decide any question involving an interpretation of any provision of the ordinance including a determination of the exact location of any district boundary if there is any uncertainty regarding the boundary. In other words a private property owner could appeal to the board from the decision made by a city official. As to its second responsibility, the board may issue special permits for any of the uses for which the ordinance requires a permit from the board of appeals. The board would also issue the permit governing the extension of a land use existing when the ordinance was adopted into a contiguous but more restricted district if the distance does not exceed a prescribed number of feet. The board cannot issue a special permit if it finds that such a permit will injure the neighborhood or otherwise be detrimental to the public welfare.



Clear lines of responsibility should be drawn between the city council, the administrative officials, planning agency, and the zoning appeals board. The planning agency prepares the master plan and subsequently the zoning ordinance, both of which become the official land use policies of the city council. Administrative officials (usually the building inspector) enforce the council's policies as represented by the zoning ordinance. The board of appeals hears complaints from the private individuals on decisions rendered by the administrative officials enforcing the zoning ordinance. Therefore the zoning board serves in a quasi-judicial capacity, has no responsibility for the preparation of the master plan or the zoning ordinance, and is free of the political responsibility borne by the council.

On the other hand, the separation of the appeals board from the planning agency and the city council does not imply that the first should be isolated from the other two. The city planning agency should make a continuous check of the types of variances requested because the character and number of applications received may indicate a trend toward a change in land use. A study of the land pattern may justify the planning agency in recommending to the council that district boundaries be changed or that other amendments to the zoning ordinance be adopted. Furthermore, a representative of the planning agency might attend the hearing to explain, if necessary, the city's policies on planning and zoning.

Even though a city has a separate appeals board, there is still the question of whether the decisions of the board should be reviewable by the city council. It is doubtful if the council should hear appeals from the decisions of the zoning board. An alternative method is to have the appeals from the decisions of the board made directly to the courts. A small city may find a satisfactory arrangement in having the appeals board advisory to the council. But where the pressure of the council's business prevents attention to the minutiae of detail accompanying a variance case or prevents a thorough understanding of the zoning ordinance, then a separate board is necessary to assure adequate consideration to all sides of the issue. A city council should always hear complaints as to the composition of the board, the form of its proceedings, and its fairness in hearing complaints. But the consideration of an appeal from the zoning board is primarily a determination of fact or the interpretation of law, both of which should probably be carried out in court under the orthodox legal rules for the presentation of evidence.

The Role of the Appeals Board in Granting Variances. The board of appeals is an administrative body with quasi-judicial powers in the application of the zoning ordinance in special and exceptional cases. The board does not have unlimited powers to grant variances. First of all, the board of appeals must accept the zoning ordinance and zoning map as correct. Second, it must restrict itself to the narrow field of adjustment falling within its jurisdiction as defined in the statutes or ordinance under which it was created. The board cannot amend the zoning ordinance nor set aright what it believes to be poor zoning. The board may conclude that certain amendments of the text or map of the zoning ordinance are justified and such proposals should be brought to the attention of the planning agency or the city council.

Boards of zoning appeals do not have police powers and must rely on the refusal of a permit or upon the courts to persuade the property owner of the rightness of their decisions. The board does have some discretionary power, for example, in specifying the conditions that accompany the variance granted the property owners, yet even these conditions must strengthen the intent of the zoning ordinance. Its hearings or investigations are largely judicial in nature but at

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the same time are quite informal despite their similarity to a court in securing evidence for a decision in each case. Courts have held that such boards must not exceed their statutory or ordinance power, that their hearing procedures must be fair, and that each plaintiff must be accorded his rights under the due process of law. A board's responsibility is substantially an evaluation of a group of facts in terms of the zoning ordinance, not a determination of the legal rights of the property owner versus the public policy of the city. The board may modify the terms of the zoning ordinance within the limits specified by the ordinance and the action of the board must rest on evidence that clearly justifies the action.

Principles to Guide the Granting of Variances. The granting of a variance is a difficult task for an appeals board. Each board should have a set of guiding principles to help decide whether a variance should be granted or not. These principles should be adopted by the board as part of its official regulations although in some cities it may be necessary to incorporate them in the ordinance itself. The set of principles given below represents a condensed version of those outlined in "A Planning Manual for Zoning", Volume II, preliminary draft, (pp. 330-335), December, 1940, (unpublished) by the American Society of Planning Officials, 1313 East 60th Street, Chicago 37, Illinois. Rules such as these only supplement the zoning ordinance and can never exceed the intent of that ordinance.

1. A variance can apply only to a specific use which is proposed for a specific lot, and application for the variance must be made in connection with an application for a building permit covering the proposed use. In other words, a variance cannot be granted for a use which may possibly be established at some time in the distant future.
2. A variance is not merely a device to permit an applicant to do something which does not conform to the requirements of the zoning ordinance. It is a means of relief which is available only when some peculiar circumstance as to size or shape of the parcel of land (and sometimes its location) is such that the literal application of the provisions of the ordinance would impair the owner's rights to some reasonable use of the property. A variance cannot be granted unless, in the first place, there are such peculiar circumstances.
3. Circumstances which cause the hardship must be peculiar to the lot in question, or to such a small number of lots that they clearly constitute marked exceptions to the property in the neighborhood. If the circumstances cited as a basis for applying for the variance are common to property in the neighborhood, a variance cannot be granted.
4. The nature of the special circumstances which justify consideration of a variance ordinarily relate only to the size or shape of the parcel of land. There will occasionally be found lots of such peculiar sizes and shapes that no zoning regulations could possibly be devised to fit them under general rules. Occasionally, but not generally, the peculiar circumstances apply to location, such as might conceivably be a result of topography or if a lot in a residential district was situated immediately between two lots on which nonconforming commercial uses were in existence. On the other hand, the location of a lot adjacent to the boundary of a less restricted district does not offer any justification for a variance. Any adjustment to be made at district boundaries should be included in the provisions of the zoning ordinance itself.
5. After establishing the peculiar circumstances applying to the lot in question, it is next necessary to show that the variance is required in order to



preserve a substantial property right of the petitioner. It is of no moment whatever that the denial of the variance might deny to the property owner some opportunity to use his property in a more profitable way or to sell it at a greater profit than is possible under the terms of the zoning ordinance. He is entitled only to a reasonable use of his property.

6. It next becomes necessary to determine whether the variance which is applied for will be materially detrimental to adjacent property, the neighborhood or the public welfare. Although there must be an absolute finding that there are special circumstances applying to the property and that the granting of an adjustment is necessary to preserve substantial property rights, it may not be possible to make an absolute finding that the granting of the variance will not be of some detriment to the neighborhood. Hence this third criterion usually requires that there shall be a finding that the granting of the variance will not be "materially detrimental" to the neighborhood or to the public welfare.

7. The regulations to which the variance is sought shall be modified as little as possible so that the substantial intent and purpose of the regulations shall be preserved. The granting of the variance should be made subject to such conditions as will contribute to this end.

8. A board should carefully distinguish between a use permit and a variance so that if both a use permit and a variance are requested for any one lot, the board's actions in considering them should be kept separate as a matter of record.

Rules for Hearings. A board of zoning appeals should conduct its hearings in an orderly manner but unnecessary formality should be avoided. To facilitate the proceedings the board should adopt rules of procedure in order to permit all interested parties to have an opportunity to present their side of the case. In 10 of the 20 cities surveyed the appeals board has adopted rules of procedure while in 10 other cities such rules have not been adopted. In some cities, however, as in Albert Lea, certain essential provisions generally found in the rules are included in the zoning ordinance. The rules set forth the organization of the board, the method of making application for a variance, and procedure in handling cases before the board, explanation of the calendar, procedure and final disposition of cases, re-hearings, and forms and records used.

The board should maintain a minute book, a docket, an index of cases, and such other records as are necessary for its operations. The minute book would show all important facts pertaining to each meeting and hearing, including a copy of each resolution acted upon by the board. The minutes should also show the vote of each member upon each resolution as well as those absent and failing to vote. The docket should contain a record of each case, the name and address of the appellant, a brief description of the premises involved, nature of the appeal, and final disposition of the case.

The docket should also show all other important data and dates concerning the case such as the dates of filing notice of appeal, filing other required information, sending out notices, posting of notice of hearing, and dates of hearings, inspections, continuances, and final determination. The secretary should also maintain an index system indicating alphabetically by names of appellants all cases coming before the board and the case number of each. All records of appeal should be kept in the office of the secretary and in such manner as to be accessible to the public at all reasonable hours.

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Board meetings should be held at regular intervals except that the chairman may dispense with a meeting by notifying each member of board in advance. All meetings should be open to the public except that the board may go into an executive session to discuss an appeal or to arrive at a decision.

The board should adopt a rule establishing the number of days from the date of refusal of a permit that an appeal must be filed. The rule should also require that the appeal be filed on an official form in order to provide the board with sufficient information for a clear understanding of the case. Furthermore, the rules should specify who should be allowed to appeal and the order of events during a hearing. Each party should be permitted to make a complete statement without interruption except that members of the board may interrupt the proceedings at any time to ask questions with the permission of the chairman.

Every appellant should be required to furnish the secretary of the board with the names and last known addresses of the last owners of record of all land within a certain distance of the premises involved. A notice of the hearing would be mailed to each such owner not less than five days before the hearing. Notices of the hearing should be posted on the premises involved and on at least three public places within a prescribed distance before the public hearing.

The rules should prescribe in detail the procedure for maintaining the board's calendar and docket--such as the time of hearing, notice in advance of hearing, the date of hearing and adjournment. Each case should be numbered serially, docketed, and placed on the calendar by the secretary for hearing. Notice of the hearing should be given to the appellant and the building inspector. All appeals should be heard by the board in the order in which they are set for hearing on the calendar except that an appeal might be advanced or postponed by order of the board.

The rules should provide for the final disposition of every appeal, the conditions under which a case may be withdrawn, and the stipulations for a re-hearing requested by any party. A re-hearing of an appeal should be granted only if substantial new evidence is submitted which could not reasonably have been presented at the previous hearing. The new evidence might accompany the request for a re-hearing so that the board can decide whether a new appeal is justified. Even then the board may grant a re-hearing only on the affirmative vote of at least two-thirds of its members.

The board's final action in every case should be in the form of a resolution stating the reasons for its decision accompanied by any additional conditions imposed by the board to carry out the intent of the zoning ordinance. These conditions should be specifically stated in the resolution and also in the building permit which is valid only so long as the conditions are conformed to. Each resolution should of course be signed by the chairman and attested to by the secretary as evidence of the board's action. An original resolution should be filed with the board's records with copies sent to the building inspector and to the appellant concerned.

Note: Copies of rules of boards of appeals and typical application forms are available on loan to the cities subscribing to the Management Information Service.